United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7004

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

NO. 75-7004

ARCHIE PELTZMAN,
PLAINTIFF-APPELLANT

- against-

CENTRAL GULF LINES INC,
DEFENDANT -APELLEE

BRIEF FOR THE PLAINTIFF, APPELLANT

ARCHIE PELTZMAN, PRO SE
8725 16th Avenue
BKLYN, 11214, N.Y.C.
256-4658

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No.75-7004

ARCHIE PELTZMAN,

Plaintiff -Appellant.

v

CENTRAL GULF STEAMSHIP CO:

Defendant - Appellee

BRIEF FOR PLAINTIFF-APPELLANT

ISSUES PRESENTED

1. IN INTERPERTING THE CONFLICT BETWEEN MARITIME & LABOR LAW IN CONSIDERING A CASE OF WRONGFUL DISCHARGE OF A SEAMAN,WHICH LAW IS SUPREME?

2. IN INTERPRETING A "CONTRACT"BETWEEN A LABOR UNION, & A SHIPPING COMPANY VIS A VIS A SEAMAN'S CONTRACT BASED ON STATUTORY ARTICLES,WHICH IS SUPREME?

3. DOES A SEAMAN HAVE BOTH A MARITIME CONTRACT & A BARGAINING AGREEMENT"CONTRACT",& CAN THE BARGAINING AGREEMENT "CONTRACT" FORCE THE DISCHARGE OF A SEAMAN,FOR ANY INFRACTION OF SUCH A BARGAINING AGREEMENT?

STATEMENT OF CASE

This is an appeal from a summary judgment order dismissing the complaint by District Court on December 13,1974 on remand.

The complaint is a maritime action for damages for wrongful discharge, with a saving to suitors action in law and equity based on the L.M.R.A., Sec. 301 for wrongful discharge based on joint employer and union action, which was arbitrary, discriminatory and in bad faith, with malice and invidious conduct towards the appellant.

REHIRING PROVISION OF COLLECTIVE BARGAINING AGREEMENT AFTER VACATION

> (d) Radio Officers and Radio Electronics Officers on passenger ships shall have the right after (6) months of continuous employment to have a special leave of absence granted of one trip off with no pay. Such special leave shall not be considered as a break in service for any purpose.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V of U.S. Constitution:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the UNites States, nor shall any state deprive any person within its jurisdiction the equal protection of the laws."

Amendment 1X of U.S. Constitution:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Article 111, Sec. 2 of U.S. Constitution:

"The judicial power shall extend... to all cases of admiralty and maritime jurisdiction."

Article 1, Sec. 11 of N.Y. State Constitution:

"Equal protection of laws, discrimination in civil rights prohibited."

"No person shall be denied the equal protection of the laws of this state or any sub-division thereof. No person shall, because of face, color, creed or religion, be subject to any discrimination in his civil rights by any person or by any firm, corporation, or institution, or by the State or any agency or subdivision of the State."

STATUTES INVOLVED

Title 28, U.S.C. 1331, 1333, 1337, 2201.

Title 46 U.S.C. 599, 41 Stat. 1006, Sec.10 (a).

Merchant Marine Act of 1920:

"... If any person shall demand or receive either directly or indirectly, from any seamen or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500.00."

Title 29 U.S.C.A. Sec. 412, Sec. 402:

"Member or members in good standing when used in reference to a labor organization includes any person who has fulfilled the requirements for membership in such organization and who neither has voluntarilywithdrawn from membership after proceedings of the Constitution andby-laws of such organizations."

Title 29 U.S.C. Sec. 523, Sec. 603(a) 73 Stat. 540:

"Except as specifically provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer...or any other representative of a labor organization... under any other Federal Law or under the laws of any State and except as explicitly provided to the contray, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal Law or Law of any State."

PROHIBITION ON CERTAIN DISCIPLINE BY LABOR ORGANIZATION

29 U.S.C. 529 - L.M.R.D.A. 1959

Sec. 609 It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise to discipline any of its members for exercising any right to which he is entitled under the provisions of this act. The provisions of Sec. 102 shall be applicable in the enforcement of this section.

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

29 U.S.C. 411 - L.M.R.D.A. 1959

Sec. 101(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for non-payment of dues, by such organization or by any officer thereof unless such member has been (a) served with written specific charges, (b) given a reasonable time to prepare his defense, (c) afforded a full and fair hearing, (d) any provision of the Constitution and by laws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effort.

RULING OF THE DISTRICT COURT

1. HELD - The union had the right to enforce the union security clause requiring membership in the union as a condition of employment after 30 days by demanding the discharge from employment of the appellant by the defendant.

2. HELD - The union did not discriminate against the appellant by demanding an initiation fee from the appellant and not from others similarly situated.

3. HELD - Even if appellant had prevailed in his cross-motion for summary judgment, he would have been unable to recover against the defendant because of an inability to show any damages.

4. HELD - The appellant was not a member of the union because he failed and refused to pay an initiation fee that was uniformlt required by the union Constitution, and regularly demanded of those in his position. The union security clause was valid and the appellant was discharged pursuant to that clause.

5. HELD - With regard to appellant's contract claim, there are no genuine issues as to any material fact, and that defendants entitled to a judgment as a matter of law pursuant to Rule 56. F.R.C.P.

THE JUDGMENT OF DISTRICT COURT

Ordeded that defendant have judgment against plaintiff dismissing the complaint. Judgment entered 12/13/74.

FACTS BEFORE REMAND

The facts are set forth in the Appellat Court decision. (R25) Briefly they are as follows:
Appellant returns to the American Radio Association after an involuntary departure from the industry, caused by the Coast Guards refusal to issue him a Radio Officers License. Before leaving the industry, he had sailed from Oct. 1943 to about 1949. He was issued an inactive assignment from the union in 1950. He sued the Coast Guard in 1967, and returned to the same union he had involuntary left back in 1950. Mr. Smith, the Sec'y-Treasurer of the union advised the appellant that he must return as a new member. Appellant asked if he has to pay an initiation fee, the Sec'y-Treasurer replies that he must sail as a permit card member for a year and then he would decide the matter. Appellant advised Mr. Smith that he didn't have to pay the initiation fee because of Court decisions in previous cases similar to appellants, that a seaman who received his validated documents from the Coast Guard, pursuant to a Court decision was not considered a new member when his departure from the industry was caused by the Coast Guard illegal actions.

The appellant attempts to use the arbitration procedure to get Group 1 status. He fails in the attempt, and after about three months, and no hearing, and none in sight, he complains to the N.L.R.B. As a result, the union puts him in Group 1. He withdraws the complaint.

He ships out and eventually gets a permanent assignment to the SS Green Ridge, a Central Gulf lines vessel. The union advised the appellant by a personal visit of a union official on board the vessel, (nine months after the permanent assignment) that unless he pays the initiation fee, he would not be rehired after a vacation from the SS Green Ridge.

He refuses to pay, and as a result is refused a stand-by assignment for the vessel as the bargaining agreement calls for. Mr. Smith informs him that he has to go to the end of the shipping list, and plaintiff refuses to accept any assignment except stand by for the vessel. Plaintiff informs Mr. Smith that he will sue the union.

The N.Y. Supreme Court ~~of Appeals~~ dismisses the action for lack of jurisdiction.

Appellant sues the N.L.R.B. in Court of Appeals, 2nd Circuit, to review the General Counsel decision not to issue a complaint against the union and Central Gulf lines.

The 2nd Circuit dismisses the motion for lack of jurisdiction.

Appellant sues the Central Gulf Lines in Federal Court for a declaratory judgment and injunction and damages for a wrongful dismissal from the SS Green Ridge.

The District Court dismisses the complaint on a motion for summary judgment.

Appellant appeals and 2nd Circuit Court of Appeals reverses and remands for a decision on the merits. The Court dismisses the complaint on a summary judgment motion. Appellant appeals.

FACTS AFTER REMAND

The District Court scheduled a conference May 30, 1974. The appellant, the defendant and the union's attorney were present.

Off the record Mr. Lerner proposed that the defendant wished to proceed by a summary judgment motion to dismiss complaint.

Off the record, appellant requested that District Court advise the defendant's and union's attorney's to supply him with records he needed and had requested previously from the defendant before reversal and had not yet received. Mr. Lerner and Mr. Steinberg were asked by District Court to cooperate with appellant in this matter.

Appellant didn't get the relevant documents from either attorneys. (See letters to both Attorneys requesting discovery. (R31)

Appellant filed a motion for an expeditious hearing on August 30, 1974, in an effort to get the discovery materials he needed to oppose defendant's motion for summary judgment.

At the hearing on the motion, District Court told Mr. Lerner to cooperate on the discovery material and advised appellant that the summary judgment was coming up soon and he would be able to put witnesses on stand and get information from them.

Mr. Lerner asked appellant to write him a letter specifying discovery material wanted. (R31)

The summary judgment motions were held on Oct. 15 & 18, 1974. Appellant examined Homer, Hajim & Spoonmore's file in union office Oct. 23, 1974. He requested from union attorney information about permit card members ie how many and how long they were sailing before they were informed that they had to pay an initiation fee. This information was refused. The attorney did not allow inspection of Group 1 files that the Court had ordered (T22B and did not allow inspection of former returning members during the Korean & Vietnam Wars.

The appellant received some papers from Hajims file a few days later from the union by mail & he wanted to examine Hajims file again to verify some documents & the amount he received.

This permission was refused. Appellant never did find out from union attorney the Court citation of Hajims Civil Suit in Californis.

Appellant filed a supplemental pleading containing material in the unions file on Nov. 12, 1974.

Appellant subpoened the following witnesses to testify at the hearing on Oct. 15 & 18, 1974:

Mr. Benson - Maritime Service Committe Offical

Mr. Wenthen - Maritime Service Committe Official - not subpoened, volunteered to testify in place of Benson.

Mr. Vronan - Personnel manager of Central Gulf - appeared pursuant to request, but did not testify.

Mr. Valles - Subpoened, but did not testify. Union employee who personally delivered Jan. 13, 1971 letter

Cap. Whitcomb - Personnell manager of Central Gulf Lines.

Mr. Smith - Sec'y-Treasurer of Union, A.R.A.

Mr. Bardyn - Personnell manager, Prudential Lines

The supplemental transcript (R41) completes all the testimony at hearing of Oct. 15, & 18, 1974. The partial transcript was included in the appellants cross-motion for summary judgment - (R32).

QUESTIONS PRESENTED BY APPELLATE COURT ON REMAND

1. Whether the Collective Bargaining Agreement provides Peltzman any basis for relief?

The Court held - Even if appellant had prevailed in his cross-motion for summary judgment , he would have been unable to recover against the defendant because of an inability to show any damages.

2. Whether Peltzman was a member of the union when he was discharged and that the union was thus not entitled to demand an initiation fee from him?

The Court held - That appellant was not a member of the union because he failed and refused to pay an initiation fee that was uniformly required by the union Constitution & regularly demanded of those in his position. That the union security clause was valid & the appellant was discharged pursuant to that clause.

3. Did Central Gulf breach the collective bargaining agreement, & if so whether Peltzman's apparent failure to exhaust contractual grievance procedures, should bar him from maintaining this suit?

The Court held - The union had the right to enforce the union security clause requiring membership in the union as a condition of employment after 30 days by demanding the discharge from employment of the appellant by the defendant.

4. Whether Peltzmans claim on the merits may well turn out to be without force.

(a) If the initiation fee was uniformly required by the union Constitution & by laws, & was regularly demanded of those in his position, then it is likely that the union security clause was properly invoked & that the contract claim must fail. The Court held-The union security clause was properly invoked.

SUMMARY OF ARGUMENT

The appeal is based on the"Law of the Case" & the Conflict between Maritime & Labor Law. Which statute is supreme? Does state law apply in a Maritime case?

Appellant argues that Maritime Law is supreme vis a vis Labor & State Laws, & if State or labor law is applied, then it can only enhance & supplement the Maritime Law.

The case is controlled by Stare-Decis decisions of the U.S. Supreme Court, ie Waterman, Southern Steamship, & Court of Appeals Vitco v Jonich, & District Court cases of Berman, Brown & Harriman cases.

Appellant argues that the defendant breached the relevant statue law & the en-contractu law of the Merchant Marine Act, title 46, in those sections protecting seamen on the job, on shore leave & the due care owed seamen.

The relevant bargaining agreement provisions supplement the seamens tenure, pension, vacation, & welfare fiduciary benefits.

The relevant provisions of Landrum Griffin which says a member can only be discharged for failure to pay dues overides any private maintenance of membership or union security clause. Also the relevant sections of L.M.R.A. which says that after 30 days the union security clause can be invoked.

Appellant argues that if the union & the company waived the clause ie the union for 3½ years, & the Company for nine months they are estopped from claiming their rights to cause his discharge for refusing to pay an initiation fee & become a member.

Appellant argues that the recent Court of Appeals decision in Texas (Mobil Oil Corp. v Chemical & Atomic Workers U.S. Law Week 12374) that seamen living in Texas, those not living in Texas, but whose employer has an office in Texas, were not obliged to pay maintenance of membership fees pursuant to a union security clause because of State Laws in Texas & the Maritime law protecting their jobs superseded any private "Contract" rights.

POINT 1

The Lower Court erred in granting summary judgment dismissing the complaint.

The errors can be summarized as follows:

1. The "law of the case" mandated a hearing on the merits on three substantive fact questions. The Lower Court only considered one (union security clause).

2. The Lower Court disallowed the introduction of evidence relating to the closed shop & preferential exclusive hiring hall clause, saying the Appellate Court had decided this issue was foreclosed (see Benson testimony at hearing (T1). This was error, since nothing in the Appellate decision foreclosed this issue.

3. The Lower Court disallowed the introduction or argument on the statutory maritime protections afforded seamen, saying this had been foreclosed by the Appellate Court. This was error, since the dictum of the Appellate Court did not foreclose evidence rebutting that dictum. (See the law of the case general mandate rule as delineated in Banco Nacionale argued in point 1).

4. The Lower Court was told to examine the bargaining agreement & decide if it afforded appellant any relief.

A reading of the Courts opinion discloses the absence of any reference to the pertinent parts of the bargaining agreement protecting employees represented by an exclusive bargaining agent from discrimination vis a vis permanent union members as against permit card members. The labor laws demand equal treatment, & the evidence is replete that the union forced the discharge of the appellant by demanding his discharge from the employer pursuant to an invalid unionsecurity clause. The evidence is substantive that the arbitration requested by the appellant was refused. This was another violation of Sec. 301 of L.M.R.A., overlooked & not considered by the Lower Court.

5. The Lower Court did not allow the appellant to have his day in Court. He had subpoened witnesses (R32) & had a right to have their evidence heard. The Lower Court decided on the 18th that he had heard enough, & thus committed the error denying appellant the right to put in the record the relevant evidence supporting his argument that the union & the company conspired to coerce the appellant into paying an initiation fee & joining the union he had joined thirty years ago, in 1944, & had left involuntarily.

See the case pleaded in his motion opposing summary judgment (R29) Seafarers International Union of North America, Atlantic Gulf Lakes & Inland Waters District A.F.L.-C.I.O., Isthmian Lines Inc. & James Moyles. 202 N.L.R.B. No. 91 Case No. 23- C B 1222, March 23, 1973, C.C.H. N.L.R.B. No. 25, 183 - holding that a union coerced a seamen by demanding a second initiation fee & refusing to refer him for employment unless he paid the fees demanded.

Appellant argues these errors were caused because the Court below was using a mistaken theory of the "Law of the Case". Austin Liquor Mart Inc. v Dep't. of Revenue 301 N.E. 2d 719, Ill. App; 1974.

Appellant argues that the bargaining agreement contains (p.25 of National Agreement between American Radio Association A.F.L.-C.I.O. & Various Companies representing Dry Cargo & Passenger Ships dated June 16, 1969) in Sec. 8, Quote, the Company accepts the principle of continuous employment for Radio Officers... & on p. 65 Vacation Plan, para (d) "Radio Officers & Radio Electronic Officers on passenger ships shall have the right after six months of continuous employment to have a special leave of absence granted of one trip off with no pay. Such special leave shall not be considered as a break in service for any purpose. (R40)

Appellant argues that the Lower Court was mandated to look at the bargaining agreement. He evidently did not, since the vacation plan & the permanent assignment prevent the discharge of appellant, under these provisions of the agreement.

It was error for the Court to dismiss the complaint on a motion for summary judgment since the Appellate Court on remand & reversal had decided the complaint was sufficient for a trial & "Matters determined by an Appellate Court forecloses Lower Court from reconsidering such matters & this is the "general mandate rule". Banco Macionale de Cuba v Farr, 243 F Supp 957 affmd 383 F 2 166 cert den 390 U.S. 956, rehearing denied 390 U.S. 1037. 1965

D.C.M.D. 1945 - On remand a Lower Court is free as to other issues, but an Appellate Courts mandate is controlling as to all matters within its compass, & the District Court must strictly follow the mandate of the Supreme Court; Maddrix v Dize 61 F. Sup reversed 153 F. 2d, 274. See p. 18 ($_{R40}$) of the Dry Cargo agreement regarding rejection for employment or discharge, & for the resolving of discharge in Sec. 18, p. 39 Grievance & Procedure.

The Lower Court was asked to look at the agreement to see if it afforded the appellant any basis for relief. There is not one mention in the opinion, of the provisions in the agreement ie p. 18 & p. 39 regarding hire & tenure.

The Grievance procedure should have been used to resove that issue of rejection for employment or discharge.

Appellant argues that by not strictly following the Appellate Courts mandate, it committed error - Maddrix supra.

POINT 11

In Appellate Court on remand second appeal, only questions in terms discussed & decided are within principles of "Law of the Case"

It was held in The Dredge D.C.N.C. 217 F. 617; if upon appeal a judgment is reversed & further proceedings directed to be had in the Lower Court, the decision of Questions of Law by the Appellate Court presented upon the unit of error or appeal constitutes the "Law of the Case".

Appellant argues that the Lower Court in neglecting to pass upon the pleadings of the appellant ie that appellant had pleaded he was a member when the union demanded the Initiation fee & so he was not obligated to pay the fee, should not preclude the Appellate-Court from deciding this question. He also claimed that as a seamen he was not obligated to pay any fees because of tit. 46 Sec. 599a prohibiting payment for providing seaman with employment.

In Nichols v. Cities Service Oil C. 256 F. 2d 521

It was Held - Applications of doctrine of waiver estopped & election requires a precise appraisal of knowledge & situation of parties at the times they acted. If such details are sufficiently manifested before full trial on the merits summary judgment may be appropriate.

Appellant argues that in his pleadings opposing summary judgment, he has pleaded that the unions rules of automatic suspension & automatic expulsion are ultra vires.(R30) without notification.

Since 1959 the Courts have the power to rule that union constitution regulations if they are contrary to the Landrum-Griffin Act & if they denigrate an employees rights, can be construed by the Courts as being of no effect since a union has been granted exclusive bargaining powers by law to protect & preserve rights of employees (AB5) not to deprive them of their livlihoods.

This union has so amended its Constitution about three times since 1949, 1952, 1969 that more & more rights of members are lost each time ie first it was automatic suspension, then automatic expulsion & now in effect, no withdrawal privileges for members, they must continue to pay dues while they not working & have left the industry. (see Constitution of the A.R.A. June 28, 1970, p. 31, Supplemental R 40) On p. 32 par. (e) is the oath an applicant must take before he is accepted into the membership.

It calls for an oath to obey all the rules & regulations of the union & to obey all rules the union may adopt.

Appellant argues that the union has waived their rights to demand an initiation fee from the appellant (assuming he was required to pay one) by waiting for three & one half years before demanding it. Meanwhile they have collected appellants dues, called fees when permit card members pay dues & have collected in the pension & welfare fund payments that companies have made on behalf of appellant.

Appellant argues that this is unjust enrichment, since in theory & it has been done in practice (during the 1940's) when thousands of new employees went to work in factories & weren't allowed to join unions, but were charged permit card fees & did not get the benefits of regular union membership. This is proscribed by the Sec. 301 of L.M.R.A., since in theory again, all employees who are represented by the union must be treated equal as far as the benefits that the unions have bargained & gotten for their members. Appellant argues that since 1954 in the case of Radio Officers union v. L.M.R.B. 347 U.S. 17, 1954, membership was not required of employees, only dues & initiation fees. But since 1959, in the Landrum-Griffin Act, only non-payment of dues can be used to discharge employees who work on land.

Appellant argues that if the defendant & the union insist that he is not a member, then he does not have to pay dues & in effect no discharge can be effected since the union-security clause cannot be invoked against him.

In Mobile Oil Corp. v. Oil & Chemical & Atomic Workers U.S. Law Week, 12/3/74,

It was held - That Texas right to work law bars an agency shop for seamen whose employment related contacts with Texas are greater than those with any other state, even though only 43 percent of them are Texas residents, & even though all of them spend at least 80 percent of their working time at sea.

Appellant argues that the Maritime law must be uniform. If a seaman employee of Mobil Oil can live outside of Texas & not be subject to a union-security clause because the Company has a Texas office, then appellant argues that uniformity requires that a New York resident who works for a New Orleans firm but who have agents in North Carolina, Florida & Texas all right to work states, cannot be forced to pay maintenance fees or be forced to join any union as a condition of employment.

Appellant argues in effect that he has defacto membership even though union has not given him de jure rights. See the engineer case, International Union of Operating Engineers v. N.L.R.B. 321 f^{d} 130, for a similar construction of de facto rights.

In Sartor v Arkansas Natural Gas co.,321 U.S. 620 -

Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial,that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.

Appelant argues that on his cross-motion for partial summary judgment it is quite clear what the truth is,& a Court of equity has full power to do complete rather than truncated justice Wirtz v Alapaha Yellow Pine Products Inc, 217 F.Supp 465.

Appellant refers the Court to the seamen"s cases pleaded in his motion opposing summary judgment (R29),all to the effect that seamen have statutes protecting them as against private "contracts",based on "contracts" that are unenforceable in twenty Right To Work States.

POINT III

STATUTORY LAW CONTROLS THIS CASE ,& THE BARGAINING AGREEMENT SUPPLEMENTS THOSE BENEFITS.

In appellant's pleadings summary judgment (R 29,31) , are five seamen's cases ,all to the effect that "contracts" for employment of seamen that are outside of the statutory articles will be construed in favor of seamen if there is the least doubt where the equities lie.

This has also been the rule in England since Lord Stowell whosat in the high Court Of Admiralty for a period of thirty years beginning in 1798.Justice Story quoted from Lord Stowell in approval when he decided that seamen were wards of the Admiralty.See Norris-The Seamen as ward of The Admiralty. Michigan Law Review Vo. 52,479 1954.

While the favored position of seamen is founded on the dictum of Justice Story,it is based on the ancient laws collected in 30 Fed.Cases,1174,The Laws of Oleron,The Laws of Wisby,The Laws of the Hanse Towns,The Marine Ordinances of Louis XLV.The U.S. Supreme Court has constently followed Justice Story's rule,& in Alexander v Gardner-Denver Co,1974 39 Led 2d 147,Held -that the forum controls the proceedings quoting U.S. Bulk Carriers v Arquelles,400 U.S. 358,1971. on p.163.Quote "Furthermore we have long recognized that "the choice of forums inevitably affects the scope of the substantial rights to be vindicated."

Appellant argues that while "nothing in Maritime law forbids the discharge of a seaman that is authorized under a legitimate union security clause",(Court of Appeals Sl.Op. 3625),even if this clause was legitimate,& even if it was enforceable in a State Court,Federal Courts will not enforce because of the tradition of over one thousand years that seamen have ex-contractu rights that hold the employer responsible for any injury suffered by the seaman in relation to his job.

Over 100 Sections of Maritime Law protect the seaman from the time he signs articles till the time he signs off &after he signs off.See Vitco v Jonich,234 F2d 161,N.L.R.B. v Waterman,309 U.S. 206,Petition of Oskar Tiedman & CO., 236 F.Supp.895 1964.

Appellant argues that the modern equitable holdings in the maritime field as exemplified by these cases,show the custom of hire & tenure of seamens employment.The latest case in this field cited in point II Mobil Oil case is right to the point of the security clause claimed in this action as a defense to the wrongful discharge,& appellant's arguments that a N.Y. resident seaman has the same rights as a Texas resident seaman must be followed ,otherwise the uniformity of the Federal Maritime Law is cut up into fifty different versions,& chaos will result if that were the case,& seamen will in effect be punished for living in those states that allow a "contract" to be enforced compelling membership in a union as a condition of employment.See the union security clause on p.23 of bargaining (R40) Quote Sec 4 (b),The company agrees as a condition of employment,that all employees in the bargaining agreement shall become,& remain members of the union thirty days after date of hiring.

Appellant argues that the appellate Court cannot ignore the tradition of over one thousandsyears,& find that this type of "contract" is enforceable in a Federal Court.

POINT III

STATUTORY LAW CONTROLS THIS CASE AND THE BARGAINING AGREEMENT SUPPLEMENTS THOSE BENEFITS

In Smeltzer v St Louis & S.F.R.Co,158 F 657,on p 657 in a discussion of liberty of contract,is quoted the rulings in relation to sailors,minors,etc ,all to the effect that contracts are to be construed in relation to special circumstances ,& they will be struck down if they are in violation of statutes protecting certain occupations,& minors.

Appellant argues that when he left a ship in Panama pursuant to the request of the Captain to sign off the articles in order that the Radio Officer he had replaced temporarily rejoin the ship in Panama,(T157),he did so in accordance with the understanding when he joined the ship in Panama,that it was a temporary relief job.

However,Appellant argues that the articles he signed in Panama stated that he was not to be discharged except at a United States Continental Port.Appellant willingly gave up his statutory rights in that instance.But on the S/S/ Green Ridge he had a permanent appoinment,& could not be replaced excepton a temporary basis as the bargaining agreement specified.

The cases cited in appellant's previous pleadings support the theory that seamen have two contracts,& nothing in a bargaining agreement can force the discharge of a seaman

on articles,or off articles,since the inerpretation of those cases cited show the custom of hiring & tenure of seamen followed in all countries of the world as shown in Ex K (rR29) .Employment services-Report of Director General,International Labor Organization,55th Conference,contains report of hiring practices of seamen ,pp 18-21,1970.See Ex L, U.S. Coast Guard letter to appellant specifying that no log entries were made regarding appellant,and that no rider attached to articles were made regarding the bargaining agreement,on the S/S Green Ridge.See copy of Shipping articles showing destination,& duration of articles ,plus the duties of seamen in relation to their jobs as specified inthe Maritime Law of Title 46.(R31)

The cases cited by appellant are the Waterman case which held that when a seaman changed his union affiliation ,he did not therby lose his right to his employment on the vessel,even though he was off articles when he changed his union affiliation. N.L.R.B. v Waterman 309 U.S. 206.A seaman who was on vacation when this dispute happened was ordered reinstated to his job, since Justice Black held that this seaman was on vacation,& his job therefore was not vacant when the union disaffiliation occured.

3.The Vitco v Jonich case supra held that a contract which without quid pro quo deprives seaman of wages because of unavoidable illness during term of employmentris pro tanto void as contrary to public policy,& unions as collective

bargaining agents cannot enter into such a contract.... Although Courts of Admitalty view with favor that which augments his rights,they look with disfavor upon agreements in derogationof them.

4.In Southern S.S. Co. V N.L.R.B. 316 U.S. 31,

It was held formal signing off shipping articles on termination of voyage was not conclusive on question whether seamen had been discharged on the ship's return to home port,but tenure o f their employment was required to be determined in the light of all the evidence concerning the employers customs & practices.

5. In Peninsular &O.S.S.Co. v N.L.R.B. 98 F2d 411,& in Texas Co.v N.L.R.B. 120 F 2d 186,-It was held the Maritime Law when in conflict with the National Labor Relations Act is supreme.

6. In Brown v National Union of Marine Cooks & Stewards reported in Court decisions,N.L.R.B. Vo VIII,1070,104 F.Supp 685.

It was held that the employer may not take shelter under the contract if there be a showing of unfair practice,since it is the statute & not the contract which is the measure of duty and the liabilty.

Appellant argues that in this action the employer not only committeed an unfair labor practice in conspiring with the union to use the leverage of discharging the appellant, but he also violated the General Maritime Law,and the Civil

Rights Law in claiming the "contract" as a defense for discharging appellant,when he well knew the true reason was to coerce the appellant to pay a second initiation fee,& to join a union that appellant had involuntarily left,twenty -one years previously,as a result of illegal Coast Guard activities in depriving him of his validated seaman's documents.

POINT IV

CONFLICT BETWEEN FEDERAL,STATE,OR LABOR LAW VIS A VIS MARITIME LAW,CONCERNING SEAMANS EMPLOYMENT,MUST BE RESOLVED BY MARITIME LAW

1. In Clayton v Standard Oil Co of N.J. (D.C. TEXAS) 42 F. Supp 734.

It was held that union agreements & ships articles construed together must be regarded as the contract between the seaman,& the shipowner,& no provision permitted seamen to leave ship before expiration of articles,the cancellation of the agreement by union with agreement of seamen would not give them a legal right to leave ship where before they left shipowner offered to allow seamen to continue work under the agreement.

Appellant argues that a cancellation of his right to rejoin the ship after a vacation,by the union,& the company's agreement to that decision,violated the general Maritime Law,

& the bargaining agreement,& such cancellation was therefore null & void, & of no effect,& will not be enforced by the Federal Courts,because of appellants permanent assignment to the vessel.

2. In the Sarah Jane,Federal cases vo 21,Case No 12,348 District Court S.D.N.Y. 1833,

It was held that Courts of Admiralty will not enforce,against seamen,stipulations in shipping articles which operate to their disadvantage,and are inserted in the articles in addition to the stipulations recognized by the Act of July 20,1790, (1 Stat.131),unless it appears from evidence outside the articles that seamen fully understood the stipulations,& received an adequate consideration therof.

Appellant argues that Maritime Law must be uniform,& the mobil Oil case discussed previously ,(AB14) holds that any union security clause will not be enforced,or maintenance of membershio clause,against a seaman irregardless of his union membership or his residence in any particular State .

Appellant argues that in Wilburn Boat Co.v Fireman's Ins. Co.p 327,J Reed in a dissenting opinion said:

One rule of law stands unquestioned.That is that all Courts State & Federal, which have jurisdiction to enforce Maritime or Admiralty substantive rights must do so according to Federal Admiralty Law,citing Watts v Camors,115 U.S.353

& Garrett v Moore - Mc Cormack,317 U.S. 239....See 1 Benedict, Admiralty,(6th ed)p55 n 77,& See p 333 n 19 Canfield,The uniformity of the Maritime Law,Mich. L R 544.Stevens,Erie RR v Tompkins, & the uniform general Maritime Law, 64 Harv L R 246.

Plaintiff argues that the uniformity imposed by maritime laws precludes the N.L.R.B.,State Courts,or State Unemployment Boards,or arbitrators to make decisions that conflict with interpretative decisions of the U.S. Supreme Court,or in the specific applicable maritime statutes that uphold the protection afforded seamen in their employment contracts.

POINT V

UNION BREACHED ITS DUTY OF FAIR REPRESENTATION BY ARBITRARY,DISCRIMINATORY,AND BAD FAITH CONDUCT TOWARDS FORMER UNION MEMBER

IN Eileen Tappins Inc.16 N.J. SUPER.53,83 A 2d 817, (Law Div 1951),

Justice Francis held that where a discharged employee sued his former employer for breach of a "permanent" employment contract,the Courts would carefully scrutinize the transaction to determine that such contract had in fact been agreed to by the employer & was not a post-employment fabrication of a disgruntled employee.Where the Court found that such an arrangement had been entered into by the employer & employee,the bargain would be enforced.83 A2d 854 ,1955.

Appellant argues that where a union notifies an employer by letter,& telephone that his employee has not paid an initiation fee,& refuses to become a member as provided in the bargaining agreement,then the union has breached the Landrum-Griffin Act which says that a member can only be discharged for non payment of dues.Since the appellant was paid up in his dues,& since he alleges that he was a de facto member,& the union insists he join,when the N.L.R.A. forbids both the union & the employer to coerce an employee to join a union,& the public policy of the United States is that employees have the freedom of association ,ie to join or refrain,then appellant argues this was arbitrary,discriminatory, & bad faith on the part of the union.

Appellant argues that even if he was not a seaman,& protected by statutes forbidding anyone to demand money for referring him for employment,the illegal,preferntial,exclusive hiring hall rules foreclosed the company & the union from enforcing the bargaining agreement.N.L.RB. v Pacific Maritime ASSN.,172 N.L.R.B. no 234 1968.& Puerto Rico S.S. ASSN.v N. L.R.B.,281 F2d 615,1960,-Held-Preferential hiring illegal.

2.In Walsche et al v Sherlock eta 1,159 A 661,1932 N.J. Contract between members of trade uninion & union providing for installation & compliance with "permit" & card indexing system for obtaining employment,held void as against public policy.

Also held Constitutional rights of laborer to sell labor & of employer to employ cannot be alienated,nor can legislature nor trade union deprive citizen thereof.

3.In International Union of Operating Engineers v N.L.R.B., CA2 321 F 2d 130,

It was held hiring hall operations under which union members acquired seniority more readily than non-members, & non -members were required to continue permit payments when not working to retain seniority was unlawful in operation.

Appellant argues that he cited two certified Court of Appeals cases against the union in which it was decreed & consented to that the illegal hiring hall practices would be discontinued.This pleading plus four more cases of illegal practices against the union were cited in previous pleadings in lower Court but were not commented on by the Lower Court.

See the A.R.A. Log (union publication) (R 40) re the Alaska S.S. Co letter to union re N.L.R.B hiring hall cases No 20 CA - 166 & the response of union,ie by striking & picketing the ships instead of obeying the consent decree.

Two years later both the union & the Alaska S.S.Co were held to have committeed unfair practices against a Radio Officer in not providing him with referral to employment he was entitled to under hiring hall rules.American Radio ASSN. - Alaska S.S. CO 98 N.L.R.B. 22,1952 enforced CA 9 1954 211 F2d 357.

4.See Wollet & Lampman,4 Stanford L R 177.The Case OF THE Sailors.

In two years thirty members expelled & 175 members subject to varying degrees of union discipline,See Mahoney v Sailors Union of the Pacific 275 P 2d 440 which explains case &Court ordered reinstatement of Mahoney because of denial of property rights of union member without due process of law.Also held that N.L.R.B. did not have exclusive jurisdiction of case & State Court had power to reinstate Mahoney.

5. See Summers -Disciplineary procedures of unions, 4 Ind.& Lab. Rel. 15-19,1950,& See 48 Va L R 78-Developing law of L.M.R.D.A. quoting cases,& See Petro- 50 Mich L R. 497 1952-Job seeking aggression,the N.L.R.A.,& the Free Market, citing cases.

In Detro v American Guild of Variety Artists, 286 F2 d 75 2d Cir cert den,366 U.S. 929,1961

Members could not be disciplined except under L.M.R.D.A. standards ie Sec 101 (a) (5) & 609-Unions must follow fair & non-discriminatory standards ie not arbitary or in bad faith.

6.Finally See Donnelly v United Fruit Co. 190 A2d 825, 1963

Justice Francis held where a union refused to arbitrate an employee grievance under a collective contract which provides

for arbitration,the employee,after seeking to utilize the grievance & arbitration procedures himself could maintain an action against both union & employer either for damages or to compel arbitration.

CONCLUSION

For the foregoing reasons the appellant urges the Court to reverse the decision of the District Court insofar as that decision constitutes an erroneous interpretation of the mandate of the Appellate Court on remand,& as to the interpretation of Maritime Law,v Labor Law, & to grant partial summary judgment to the appellant on the grounds that a wrongful dismissal,& refusal to rehire,by the Company deprived him of his property rights to a lawful employment,& deprived him of his contractual,ex-contractu,& tenure rights in the job with no fault whatsoever on his part.

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Respectfully submitted

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